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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161.

DORA SUROWITZ, *Petitioner,*

vs.

HILTON HOTELS CORPORATION, *et al., Respondents.*

BRIEF FOR RESPONDENT HILTON HOTELS CORPORATION IN OPPOSITION TO CERTIORARI.

INTRODUCTION.

We oppose the petition for certiorari. The decision below is clearly correct, there is no conflict among circuits, and the case has no import whatsoever beyond its peculiar, limited and non-recurring facts.

The petition strives for the impression that the courts below ruled against Mrs. Surowitz because she was a foreign-born and unsophisticated person with little formal education. The record reveals, however, that the case was dismissed solely because the complaint was falsely verified in violation of Rule 23(b). Petitioner steadfastly refused the District Court's several invitations to cure the defect by amendment or otherwise; instead, petitioner insisted upon attempting to establish that Rule 23 (b) does not require a truthful oath. Having failed, petitioner should not seek review here by subtly insinuating that the courts below were prejudiced against unschooled litigants.

STATEMENT OF FACTS.

The complaint, although needlessly voluminous, accuses the individual defendants of the simple fraud of selling their private stock holdings to the Hilton Hotels Corporation at an artificially inflated price (C. A. App. 1-63). The complaint was "verified" by the petitioner upon personal knowledge, information and belief; she specifically swore of her own knowledge that allegations in thirty-three separate paragraphs were true and that all the remaining allegations were true upon her information and belief (C. A. App. 64).

Petitioner's deposition was taken shortly after the complaint was filed (C. A. App. 94); she testified that she had neither personal knowledge nor information and belief concerning *any* of the accusatory allegations of the complaint (C. A. App. 101-13). Petitioner's sworn testimony reveals she did not know whom she was suing, what misconduct she was charging nor what relief she was seeking (C. A. App. 101-13). The District Court specifically found that petitioner's disclaimer of any information or knowledge about her sworn complaint "was not caused by the use of technical or legal language in the questions or by her failure to understand what was being asked," and that her counsel had so conceded (C. A. App. 153-54).

The Court of Appeals thus characterized the petitioner's deposition testimony (Petn. App. 34-35):

> "We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.
>
> "We can only conclude, as did the court below, that

> plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant."

The petition does not seriously contest this finding (Petn. 6-7, 9-10, 12-13, 17).

Petitioner testified that she signed the complaint at the request of her son-in-law, Irving Brilliant; Brilliant told her *he* "would like to take action" and asked *her* to sign the complaint; she in fact testified at the deposition that Brilliant "was the one that knew all about it" (C. A. App. 96, 107, 110). Brilliant's affidavit (filed in the District Court to explain the plaintiff's verification) admits that he made the arrangements concerning financing of the suit, and even engaged petitioner's counsel (C. A. App. 120-23). Brilliant also has long been a legal owner of Hilton stock, but does not care to be a party to this suit (C. A. App. 124). The Court of Appeals concluded (Petn. App. 35):

> "[I]t affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about."

After the deposition, the defendants moved for dismissal; the District Court held several hearings concerning the matter. The Court found that the plaintiff's verification of the complaint as required by Rule 23(b) was "false and sham" and therefore a nullity (C. A. App. 157). Although the petition for certiorari states (at page 6) that "the Court refused to accept additional verification by counsel," the record shows that the District Court repeatedly gave counsel opportunity to amend the verification, to substitute another verification, or to add or substitute another party plaintiff (C. A. App. 156-57; C. A. Supp. App. 10, 13-14, 23). The action was dismissed only after plaintiff's counsel made it plain that they would not amend and instead insisted on a ruling upon the complaint as originally verified (C. A. App. 156-57).

REASONS FOR DENYING THE WRIT.

I. This Case Is Sui Generis and Its Facts and Holding Do Not Merit Review by This Court.

We submit that this case is patently not "certworthy."

The record shows a bizarre and almost incredible set of circumstances that have never arisen before and in all likelihood will never arise again. The petitioner swore, of her knowledge and upon information and belief, to the truth of a complaint of which she was totally incognizant (Petn. App. 34); no plaintiff could conceivably have been less informed concerning her complaint, the lawsuit, the defendants, or what she was doing in court.

Nor do the oddities of the case stop with petitioner's manifest false swearing. Once petitioner's deposition revealed that she was the plaintiff in name only, and had neither knowledge nor control of the suit, the District Court gave petitioner's counsel the fullest opportunity to cure the defect by: (1) amending the verification, (2) amending the complaint, or (3) joining or substituting another party as plaintiff (C. A. App. 156-57, C. A. Supp. App. 10, 13-14, 23).

Instead of choosing any of these alternatives, or even a combination of the three, petitioner stood on the complaint and asked the District Court to hold that a false verification satisfies Rule 23 (b) (C. A. App. 156-57, Petn. 6). Petitioner's refusal to amend or do anything to cure the defect is the more inexplicable in light of the fact that, as the record shows, Mrs. Surowitz' son-in-law Brilliant—who conceived the suit and is arranging its financing—had full standing to join as plaintiff (C. A. App. 107, 110, 120-24, 154-55).

In sum, petitioner preferred to tender to the District Court and to the Court of Appeals the question whether

a false verification satisfies Rule 23(b), instead of easily eliminating the question and proceeding to the merits. Petitioner is still pursuing that identical quest here; this Court is now implored that the decision below rejecting a false oath will have a drastic impact upon the investing community and the gullible public[1] (Petn. 7-10). Petitioner's plaint is without substance.

This Court has often admonished that it will only grant certiorari to hear cases of general importance and upon issues that are unavoidably presented by the nature of the case and position of the parties; the questions thus reviewed must be "beyond the academic or the episodic." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74. See also *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393; *Mangum Import Co.* v. *Coty*, 262 U. S. 159, 163; Supreme Court Rule 19. Cf., *Duncan* v. *California*, 366 U. S. 417; *Williams* v. *Zuckert*, 371 U. S. 531; *Smith* v. *Butler*, 366 U. S. 161. The petitioner here cynically elected to stand upon an easily curable defect of pleading in the face of the District Judge's elaborate precautions to afford every opportunity to amend (C. A. App. 156-57; C. A. Supp. App. 10, 13-14, 23). We believe this Court should not further indulge the petitioner by granting still a third hearing on the self-answering question whether a false verification satisfies Rule 23 (b).

1. The petition cites *Gagnon* v. *Buchanan*, No. 65-C-189, N. D. Ill., April 19, 1965, as a decision heralding the instant case as a "landmark" and "applaud[ing] new technical devices for dismissing good causes of action, *without considering the merits*" (Petn. 10; emphasis in original). The record in the *Gagnon* case belies petitioner's claim; that case involved a derivative suit in which the plaintiff evinced full knowledge and information about her complaint at deposition. Although the instant decision was cited by the defendants there, the District Judge based the dismissal of that suit "*strictly on its merits*" (Transcript of Proceedings, p. 9, April 15, 1965; emphasis added).

There is likewise no merit in petitioner's claim that the decision below will hamper private securities law enforcement (Petn. 2-3, 7-10, 17-18). The sui generis nature of this case itself rejects such a contention. Moreover, and equally significant, the infirmity of the complaint is *not* because of any securities law provision; verification is required by Rule 23(b) in *all* derivative suits, whether the action be statutory or at common law. Petitioner does not claim *she* was defrauded by any securities transaction, but quite the contrary, sues derivatively and therefore as a fiduciary. As this Court pointed out in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 549:

> "A stockholder who brings suit on a cause of action derived from the corporation *assumes a position, not technically as a trustee perhaps, but one of a fiduciary character.* . . . The interests of all in the redress of the wrongs are taken into his hands, *dependent upon his diligence, wisdom and integrity.*" (Emphasis added.)

The Court further noted in *Cohen,* at 548-50, that the derivative suit has a long and inglorious history of abuse that Rule 23(b) was expressly designed to curb. See also Wood, *Survey and Report Regarding Stockholders' Derivative Suits,* pp. 58, 60-61 (1944); *Pioche Mines Consolidated, Inc.* v. *Dolman,* 333 F. 2d 257, 265 (9th Cir.); *Gottesman* v. *General Motors Corp.,* 28 F.R.D. 325, 326 (S.D.N.Y.). Cf. *In re Frank,* 234 Fed. 665 (E.D. Pa.), *aff'd* 239 Fed. 709 (3rd Cir.).[2]

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2. In the *Frank* case, a bankruptcy suit, the court said of false oaths (234 Fed. at 666-67):

> "The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business, the credit, the financial standing, the property and reputation of the person against whom the petition is filed are at stake. . . . Thus irreparable damage may result from an honest mistake. . . . [C]reditors may [not] invoke the jurisdiction of the court where, without knowledge of the facts, they recklessly subscribe to a petition setting out acts of bankruptcy without even

The petition, however, argues (at page 12) that the decision below neither reaches nor corrects "a single one of the evils toward which Rule 23(b) is directed." We submit that the exact opposite is true; giving full force and vitality to the verification requirement is peculiarly well suited to preventing derivative suit abuses. A truthful verification assures that derivative plaintiffs possess the knowledge and good faith belief necessary to discharge their fiduciary duties; it also assures that the gullible will not be duped into loaning their names to persons who wish to sue but remain in the background—the precise abuse that the Court below found here (Petn. App. 35). Finally, requiring a meaningful verification discourages the filing of derivative suits that are motivated by reasons other than the redress of corporate wrongs. See *Cohen, supra,* 337 U. S. 541, 548-50; 4 Thompson, *Corporations,* § 4571 (1st ed. 1895); *Home Fire Ins. Co.* v. *Barber,* 67 Neb. 604, 93 N. W. 1024, 1029.

We submit that the petition presents neither a novel nor far-reaching question for this Court; the impact of the case is limited to its own narrow, unusual and uninspiring facts.

II. There Is No Conflict of Decisions.

The petition curiously contends that the decision below is in direct *conflict* with prior cases (Petn. 13-17) while at the same time urging that the case is completely *novel* (Petn. at 11-13). The conflict is as non-existent as the case is insignificant.

Koster v. *Lumbermen's Mutual Casualty Co.,* 330 U. S. 518 (discussed in Petn. at 13-14) was a *forum non conveniens* case; the sole question was whether the trial should be held in New York, where the plaintiff resided, or in Illinois, the defendant's place of business. In holding that

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the 'formality' of . . . making oath to the petition, and where the notary public falsely certifies that oath was made before him."

Illinois was the proper forum, the court noted that the plaintiff had little potential value as a *witness*, and described such a plaintiff as often being a mere "phantom" in a derivative suit. 330 U. S. at 523-26. Petitioner here seizes upon the word "phantom" as though it somehow exonerates her false verification. However, in *Koster*, the Court specifically noted that, "although a plaintiff's own interest may be small," he may sue on behalf of other shareholders *only* "if the conditions laid down by Rule 23 . . . are complied with. . . ." 330 U. S. at 523-24.[3]

Petitioner's reliance on *Murchison* v. *Kirby*, 27 F. R. D. 14 (S. D. N. Y.) (Petn. 15-16) and *Freeman* v. *Kirby*, 27 F. R. D. 395 (S. D. N. Y.) (Petn. 15-17), also is misplaced. Both cases involved certification by counsel under Rule 11, F. R. C. P., and had nothing to do with verification by the plaintiff under Rule 23(b). Petitioner apparently believes that Rule 11 is a sufficient safeguard against abusive or frivolous derivative suits, without also requiring verification by the plaintiff. But, as the Court below tersely noted (Petn. App. 35):

> "Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a semantic exercise in drafting its provisions."

In *Murchison, supra*, the plaintiff was fully informed of the basic grievances alleged in his complaint (unlike petitioner here); Rule 23(b) was not remotely in issue. *Freeman* v. *Kirby, supra*, not only fails to support the petitioner's argument, but we think directly refutes it. The plaintiff there knew nothing about the allegations of the complaint and (like petitioner here) had done nothing more than "lend his name" to those who had instigated the

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3. The lower courts have rejected the petition's tortured misreading of the *Koster* "phantom plaintiff" dictum. See, *e.g.*, *Freeman* v. *Kirby*, 27 F. R. D. 395, 399.

action. The court struck the complaint, saying (27 F. R. D. at 399):

> "If an attorney's signature to a pleading is to be more than a hollow gesture he must do more than *obtain a person willing to lend his name as a plaintiff;* especially so where, as here, *the complacent plaintiff is without knowledge, is content to act the role without reading the complaint,* and expects to be paid for his time. An attorney's certification under such circumstances runs flagrantly afoul of the purpose of the rule." (Emphasis added.)

Thus, according to petitioner's own cited authority, Rule 11 not only fails to save the complaint but provides another reason to sustain its dismissal.

We submit that the petitioner's laborious search for a "conflict" of decisions was a vain exercise; the decision below is correct and in complete harmony with the letter, spirit and judicial gloss of Rule 23(b).

CONCLUSION.

For the foregoing reasons, we urge that the writ be denied.

Respectfully submitted,

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